NO. 4051

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA STEAMSHIP COMPANY,
a corporation,
Plaintiff in Error,

vs.

BERNARD McHUGH,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NUMBER ONE.

BRIEF OF PLAINTIFF IN ERROR

R. E. ROBERTSON,
A. H. ZIEGLER,
BOGLE, MERRITT & BOGLE,
Attorneys for Plaintiff in Error.

INDEX

SUBJECT	Page
Statement of the Case	1
Assignments of Error	5
Points or Legal Principles Involved	29
Argument	31
Opinion evidence, that the appliance with which plaintiff worked was dangerous, was irrelevant and inadmissible	31
Evidence of plaintiff's pecuniary condition and financial embarrassment was irrelevant and inadmissible	34
Evidence of an accident occurring after plaintiff's injury was irrelevant and inadmissible	36
Evidence of changes, repairs and precautions subsequent to plaintiff's injury was irrelevant and inadmissible	38
Defendant was entitled to cross-examine plaintiff's witness as to the positiveness of his testimony	42
Defendant was entitled to offer evidence in rebuttal of plaintiff's evidence	44
Instructions must be based upon evidence and not upon abstract propositions of law	45
Act of June 11, 1906, was inapplicable	49
Common law doctrine of assumption of risk applies under act of June 11, 1906	60
Contributory negligence is a bar to a recovery under the Act of June 11, 1906, except where employee's negligence is slight and employer's negligence is gross in comparison thereto	73
Negligence necessary under Act of June 11, 1906, to create liability	79
Defendant entitled to a directed verdict	81
Conclusion	87

NO. 4051

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA STEAMSHIP COMPANY,
a corporation,
Plaintiff in Error,

vs.

BERNARD McHUGH,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NUMBER ONE.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

This is an action instituted by the plaintiff (defendant in error) against the defendant (plaintiff in error) to recover damages for an alleged personal injury suffered by plaintiff.

Complaint. Plaintiff alleged that defendant was a corporation and a common carrier of freight in

the coastwise carrying trade in Alaskan waters; that on March 8, 1922, at Ketchikan, Alaska, he was employed by defendant as a stevedore to assist in unloading coal from defendant's steamship "Latouche" and was engaged in shovelling coal into a large, heavy iron bucket furnished by the defendant; that the united effort of three men was required to pull said bucket to the place where it could be filled with coal; that the bucket had a large, heavy handle held in place by an iron trigger, and that, on account of long wear and hard usage, the bucket was a dangerous and unsafe appliance for said work; that plaintiff with two other employees was pulling the bucket on the floor of the vessel's hold to the point needed for loading, when said trigger became loosened and caused the handle of the bucket to fall upon plaintiff's foot and across the instep, thereby breaking and crushing the bones, tendons, muscles and flesh of the foot and crippling plaintiff for life; that because of said injuries plaintiff was in the hospital for medical treatment for many weeks and suffered great pain and was obliged to suspend all labor, thereby suffering the loss of all wages from March 8, 1922; that defendant knew that said appliance was unsafe and dangerous but negligently failed and refused to replace and repair it with a safe appliance; that plaintiff had no knowledge or means of ascertaining the condition of said iron bucket and the parts thereof, and that because of his inexperience, being

a common laboring man without knowledge of the mechanism of said bucket and its parts, and because of the darkness in said hold, he was unable to discover the defects in said appliance; that it was defendant's duty to furnish plaintiff with safe and proper appliances or bucket for use in said work; that defendant negligently failed and refused to furnish safe and proper appliances for such work or a well lighted place in which to work; and that by reason of defendant's neglect and carelessness plaintiff suffered damages in the sum of $10,000; that at the time of the injury plaintiff was a strong vigorous laboring man, thirty-eight years old, capable of, and earning, $6.50 per day; that said injury wholly destroyed his earning capacity from the date of the injury to the date of the complaint, and permanently reduced his earning capacity by one-half or more for life. (P. R. pp. 1-5).

Amended Answer. Defendant generally denied all of the allegations of plaintiff's complaint, but admitted that it was a corporation and engaged as a common carrier of freight in the coastwise carrying trade in the waters of Alaska, and that on or about March 8, 1922, at Ketchikan, plaintiff was employed by it as a stevedore in unloading coal from defendant's steamer "Latouche." Defendant set up two affirmative defenses:

First: The combined defenses of negligence of fellow servants and of plaintiff's contributory

negligence, namely: that plaintiff was a member of a gang of longshoremen all of whom, including plaintiff, were of full age and experienced in the work aboard said vessel; that the injury was not caused by defendant's negligence but by the negligence of plaintiff and two other members of the longshore crew, with plaintiff's acquiesence and assistance, in moving the tub by pulling it backwards, instead of moving it forward in, and as they, including plaintiff, knew was, the customary and safe way by pulling it on the beckets with which the tub was provided.

Second: The defense of assumption of risk, namely: that defendant was a member of a gang of longshoremen engaged in unloading coal from defendant's vessel, and that plaintiff was of full age and experienced, and knowingly assumed the risks incident thereto; and that plaintiff, after he had become thoroughly acquainted with, and knew the exact condition of said tub, and without making any complaint or objection as to its condition, negligently chose to move said tub by pulling it backwards instead of moving it in, as he knew was, the customary, proper and safe way by pulling it forward by the beckets with which it was provided.

In the affirmative defenses defendant alleged that the steamer "Latouche," at the time in question, was lying in the tidal and navigable waters of the North Pacific Ocean, i. e.: in Tongass Nar-

rows, in the Territory of Alaska, and was then and there made fast by lines or ropes to a certain dock or wharf that extended out into said waters and was then and there fully equipped with coal tubs and other appliances in safe, substantial and seaworthy condition necessary for and ordinarily used in said work and on and about steamships similar to said vessel. (P. R. pp. 6-11).

Reply. Plaintiff generally denied the allegation of the two affirmative defenses of the amended answer, but admitted that the steamship "Latouche" was then and there lying in the tidal waters of the North Pacific Ocean and was made fast to the dock and wharf as alleged in the amended answer, and that plaintiff was employed by defendant as a longshoreman. (P. R. pp. 13-15).

Trial was had before a jury which returned a verdict against defendant for the sum of $4750.00, upon which judgment was entered on April 4, 1923, and from which judgment a writ of error has been prosecuted to this Court. (P. R. pp. 16, 17, 61).

ASSIGNMENTS OF ERROR.

I.

The Court erred in permitting plaintiff's witness Young, on direct examination, over defendant's objections, to answer the question "Was that a safe appliance" (referring to the bucket) "to be used at that time under those circumstances in that

work?" to which said witness answered "I would not consider it so." (P. R. pp. 74, 75).

II.

The Court erred in refusing to permit plaintiff's witness Young, on cross examination, to answer the question propounded by defendant "Do you feel as positive of that" (referring to the position of the men working on the ship) "as anything else you have said in your testimony?" (P. R. p. 126).

III.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to testify as to the length of time the bucket was used after plaintiff was injured, and particularly to answer the question "How long was that bucket used after Barney was hurt?" To which said witness answered "I don't know just how long after." (P. R. p. 137).

VI.

The Court erred in permitting plaintiff's witness Williams, on direct examination, over defendant's objections, to answer the question "Was there any change made in the bucket after Barney was hurt?" To which said witness answered "Well, not very long afterwards they took the bucket and laid it aside—the same bucket I was working on. That left four men to the bucket and they put me

on the hook. They worked quite a ways under the hatch and I dragged the hook to hook on to the other buckets." (P. R. p. 138).

VIII.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to the length of time the bucket was used after the accident, and particularly to answer the question "How long did you work with it." To which said witness answered "It wasn't over two hour at the most." (P. R. p. 149).

IX.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to the bucket tripping after he went to work, which testimony in questions and answers is as follows:

"Q. Just explain to the jury how that happened and how soon after you went to work.

"Q. How long after you went to work did that happen?

"A. The first time is happened was about half an hour after.

"Q. What happened at that time?

"A. Why it spilled all the coal out of it.

"Q. Where was it when it spilled the coal?

"A. In the center of the hatch.

"Q. How far up?

"A. Oh, it didn't get off the ground at all.

"Q. Well, was the wire cable attached to it when it spilled?

"A. Yes, sir.

"Q. Was anybody touching it?

"A. No, sir.

"Q. What made it trip itself, off, do you know?

"A. Why the catch.

"Q. What was the matter with the catch?

"A. Wore out is all." P. R. pp. 149-150).

X.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to other occasions of the bucket tripping, and particularly to answer the question "Did it do that again any other time that evening?" To which said witness answered, "Yes, sir." (P. R. p. 150).

XI.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to testify as to the manner that the bucket's handle fell on a subsequent occasion, and particularly to answer the question "Why did the

handle fall that time?" To which said witness answered "Oh, it come unhooked." (P. R. p. 150).

XII.

The Court erred in permitting plaintiff's witness Gillis, on direct examination, over defendant's objections, to give his opinion as to whether or not the bucket was a safe appliance, and particularly to answer the question "You may state to the jury whether or not, in your judgment, it was a safe appliance, safe appliance to be used for that purpose that night." To which said witness answered "It wasn't; no; no." (P. R. p. 151).

XIV.

The Court erred in permitting plaintiff's witness Soderberg, on direct examination, over defendant's objections, to give his opinion as to whether or not the bucket was a safe appliance for handling coal, and particularly to answer the question "Now, from your examination of that bucket that night, and from the actions that you saw it performing, was it or was it not a safe appliance for handling coal," and "Well, then, I will renew my question as to whether or not this bucket that night, as it was being used by Barney and these other people at that time was a safe appliance?" To which said witness answered respectively " It was not" and "No, sir, it was not a safe appliance." (P. R. pp. 162-163).

XV.

The Court erred in permitting plaintiff's witness Soderberg, on direct examination, over defendant's objections, to testify as to the manner another man was hurt after plaintiff's accident, and particularly to answer the question "How was he hurt?" To which said witness answered "The same way as Barney, only I think the bail took him further up on the leg. They got this man out of the hold and I seen him a couple of days afterwards. He was limping around, and I have seen him since." To which answer, upon defendant's motion, the Court ruled "All that latter part may be stricken." (P. R. pp. 163-164).

XVI.

The Court erred in permitting plaintiff's witness Klemm, on direct examination, over defendant's objections, to testify as to his opinion as to whether or not the bucket was a safe appliance, and particularly to answer the question "Mr. Klemm, from your experience as a dumper of these buckets and from your examination of that particular bucket that night, I will ask you as to whether or not it was a safe appliance to be used in that class of work?" To which said witness answered "Well, I wouldn't say so," and "I wouldn't say it was safe because there was no way of holding that, because there was no way of holding that, because, for illustration, I think it was the

first or second bucket that came out of the hold—you hoist the bucket out and give it a kind of swing you know. The winch driver did. You know, he wasn't kind of careful enough; or kind of jerked it a little bit and the bucket was going back and forth enough to throw that little tripper up and it tripped. The bucket dumped itself before it ever got out to me." (P. R. pp. 179-180).

XVIII.

The Court erred in permitting plaintiff, in his own behalf, on direct examination, over defendant's objections, to testify as to his receiving and why he had to receive contributions or charity from other people, and particularly to answer the question "Will you state to the jury then, Mr. McHugh, why you have had to receive contributions or charity from other people?" To which said plaintiff answered "I had to receive money for the reason that I was unable to limp fifty yards in any half hour from the time I left the hospital, for a few months after I left the hospital. I was unable to work and I had no money; at the time I left the hospital I had only $28.00 of my own and the money I received afterwards of course I had to borrow it; that I must have in order to live." (P. R. pp. 216-219).

XXIV.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to an-

swer the question "If the patient complains at this time of a soreness and swelling in the first metatarsal bone, what, in your opinon, would cause that to exist at this time?" (P. R. p. 345).

XXV.

The Court erred in refusing to permit defendant's witness Story, on direct examination, to answer the question "Well Doctor, if the patient complains of a soreness there now, can you express an opinion as to whether that would be due to the original injury or to some intervening cause after his discharge from the hospital?" (P. R. p. 345).

XXX.

The Court erred in denying defendant's motion for a directed verdict for the defendant herein at the close of the evidence." (P. R. p. 393).

XXXV.

The Court erred in failing and refusing to give defendant's requested instruction No. 5, as follows:

> "I instruct you that if you find from the preponderance of the evidence that the plaintiff took hold of the rear rim of the coal tub in question and pulled or shoved thereon, and that when he did so he knew that the bail of said coal tub, if it should fall, could only fall toward the rear and not toward the front of said tub, and that he could have taken hold of said tub by the rim forward of the bail thereon, or by handles attached to the lip of the

tub, or beckets attached to said handles, instead of taking hold of said tub by the rear rim thereof, and that by so doing he could have moved the tub in safety, and that he took hold of the said rear rim of said tub and pulling or shoving thereon was a dangerous way of moving said tub, and that to take hold of the rim or said tub forward of the bail or by handles or beckets attached to said handles on the lip of said tub was a safe way of moving said tub, and that the plaintiff voluntarily selected a way which he knew was a dangerous way instead of a way which he knew was a safe way of doing said work, in such case the jury will find for the defendant." (P. R. pp. 394-395).

XXXVI.

The Court erred in failing and refusing to give defendant's requested instruction No. 6, as follows:

"I instruct you that if you find from the preponderance of the evidence that the plaintaiff was directed in moving the coal tub on which he was working to move the same forward with its lip or nose in a forward position, and to so move it forward by pulling on the handles or beckets attached to said handles on the lip of said tub, if you find there were any such handles or beckets, or by taking hold of said tub forward of the bail, and you further find that such was a safe way to move said tub, and that it had been done, the plaintiff would not have been injured, and you further find that the plaintiff, instead of adopting this method, moved said tub either by pulling or shoving on the rear rim, and was injured in consequence of so doing, then the plaintiff's own negligence was the proximate cause of the injury, and in such case you should find for the defendant." (P. R. pp. 395-396).

XXXVII.

The Court erred in failing and refusing to give defendant's requested instruction No. 7, as follows:

> "I instruct you that if you believe that plaintiff was injured by reason of the bail of the coal tub falling against or upon his foot, and if you find that the condition of said tub including the bail thereof and the trigger or catch, was open and obvious to plaintiff, and considering his age and intelligence, he should and ought to have known the danger, if any, confronting him in the use of said tub and if you find from a preponderance of the evidence that the plaintiff, considering the circumstances surrounding him at the time, was not exercising such care and prudence in undertaking to do the work at which he was engaged that would or should ordinarily be exercised by a person of like age and intelligence of plaintiff under similar circumstances, then plaintiff cannot recover, even though the plaintiff at the time was working pursuant to instructions of the defendant, if you should so find." (P. R. pp. 396-397).

XXXVIII.

The Court erred in failing and refusing to give defendant's requested instruction No. 8, as follows:

> "I instruct you that if you find that the plaintiff was injured by reason of the bail of the coal tub in question falling upon or against him, and if you find from a preponderance of the evidence that the condition and manner in which said bail was operated and held in place and released was open and obvious to plaintiff, and if you find from a preponderance of the evidence that plaintiff was of sufficient

intelligence to comprehend and know, and ought to have known, considering his age and intelligence, the danger, if any, surrounding him, then plaintiff cannot recover anything in this case, even if the defendant company was at fault and negligent in allowing said coal tub to be used by the plaintiff or in permitting the trigger or catch on the bail thereof to be out of order, if you find by the preponderance of the evidence that such is the fact and in such case you will render your verdict for the defendant." (P. R. p. 397).

XXXIX.

The Court erred in failing and refusing to give defendant's requested instruction No. 10, as follows:

"I instruct you further that an employee who continues in the service of his employer after notice of a defect increasing the danger of the service, assumes the risk as increased by the defect, unless the master promises to remedy the defect; and in the event that the master does so promise, the servant may, by relying upon such promise, remain in the service of the master only for such a time thereafter as would be reasonably sufficient to enable the master to remedy the defect, and if the master does not, within a reasonable time after such promise, remedy the defect, then and in such event, if the servant continues still in the employ of the master, he assumes the risk as increased by the defect; and if you believe in this case that the tub with which the plaintiff was working, that the trigger or catch holding the bail in place thereon was defective, and that the defendant company promised to remedy the same but failed to do so

within a reasonable time after such promise, and that McHugh continued thereafter to work for the defendant knowing that the defendant had failed to remedy the defect within a reasonable time after such promise, then and in such event, I instruct you that McHugh assumed the additional risk of the defect, if any, in said tub, and you will return a verdict for the defendant." (P. R. pp. 398-399).

XL.

The Court erred in failing and refusing to give defendant's requested instruction No. 12, as follows:

"You are instructed that if McHugh engaged with the Alaska Steamship Company in the work of unloading or assisting to unload coal from the steamship Latouche without at the time fully understanding or comprehending the dangers incident to such work, yet if you find that between the time of his employment and the time he was injured he learned of those dangers, if any, or in the course of his employment he ought to have known of the liability to accident by being hit by the bail of the coal tub if the same should fall, it is your duty to find that he assumed the risk of such injury as incident to his employment, and you cannot attribute the accident to the negligence of the Alaska Steamship Company." (P. R. p. 399).

XLI.

The Court erred in failing and refusing to give defendant's requested instruction No. 16, as follows:

"You are instructed that the Alaska Steamship Company is not responsible for the negligence of McHugh's fellow servants, if the jury believes from the evidence that plaintiff's fellow servants were guilty of negligence, and that such negligence caused the accident by which plaintiff claims to have been injured. The term "fellow servants" as used in these instructions means those who were engaged with the plaintiff in the same work, without any relation to each other, except as co-laborers, and without rank." (P. R. pp. 399-400).

XLII.

The Court erred in failing and refusing to give defendant's requested instruction No. 17, as follows:

"You are instructed in this case that if you find from the preponderance of the evidence that the injury which McHugh claims to have suffered was caused by the negligence of his fellow servants, that is, if his fellow servants so negligently handled, moved, pulled or shoved the coal tub with or about which McHugh was working, so as to cause the bail or handle thereof to fall and strike McHugh and to cause said injury, then your verdict should be for the defendant." (P. R. p. 400).

XLIII.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 1, as follows:

"I instruct you that negligence is defined as being the failure to observe, for the protection of the interest of another person, that

degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.

"And in this case you cannot find a verdict for the plaintiff McHugh in any amount whatsoever unless you first find by a preponderance of the evidence that the injury, if any, sustained by him and the damages, if any, incurring to him by reason thereof, were the result of negligence, as hereinbefore defined, of the defendant Alaska Steamship Company or its officers, agents, or employees, or by reason of some defect or insufficiency due to its or their negligence, as hereinbefore defined, in the coal tub or bucket with which said plaintiff McHugh claims to have been working.

"In this behalf I instruct you that the mere occurrence of the injury, or of the damage complained of, if you find by a preponderance of the evidence that the plaintiff McHugh did sustain such injury and damages, is no evidence of negligence on the part of the defendant Alaska Steamship Company or of any of its officers,agents or employees or that the existence of a defect or insufficiency if you so find, in said coal tub or bucket was due to its or their negligence, and I further instruct you that the burden is on the plaintiff McHugh to show, by a preponderance of the evidence, that the defendant Alaska Steamship Company was guilty of negligence, as hereinbefore defined, which proximately caused the injury and damage. The plaintiff McHugh has the burden of proving, by a preponderance of the evidence, that the defendant Alaska Steamship Company was guilty of negligence." (P. R. pp. 400-402).

XLIV.

The Court erred in failing and refusing to

give defendant's supplemental requested instruction No. 3, as follows:

> "I instruct you that the mere fact that you find from a preponderance of the evidence that the bail of the coal tub on or about which McHugh claims to have been working fell upon or came in contact with his foot and injured it as claimed by him and that he suffered damages therefrom as contended by him, is no evidence of negligence on the part of the defendant Alaska Steamship Company or any of its officers, agents or employees or that the defect, if you find by a preponderance of the evidence that there was a defect, in said tub or bucket was due to its or their negligence, but the burden is on McHugh to show by a preponderance of the evidence that the defendant Alaska Steamship Company was guilty of negligence which proximately caused said, if any, injury, and said, if any, damages, that is to say, the burden is on McHugh to show by a preponderance of the evidence that the defendant Alaska Steamship Company or its officers, agents or employees failed to observe, for the protection of said McHugh while he was working on said vessel Latouche on March 9, 1922, that degree of care, precaution and vigilance which the circumstances in connection with said work justly demanded, and that by reason thereof said McHugh suffered said injury and damages." (P. R. pp. 402-403).

XLV.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 4, as follows:

> "I instruct you that in this case even though you should find the defendant Alaska

Steamship Company guilty of negligence from a preponderance of the evidence and that the plaintiff McHugh is entitled to damages, you should not base your verdict upon the theory or conclusion that said McHugh has been permanently injured for the reason that there is no evidence in this case that said McHugh has been permanently injured." (P. R. p. 403).

XLVI.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 5, as follows:

"I instruct you that in this case even though you should find from a preponderance of the evidence the defendant Alaska Steamship Company guilty of negligence and that the plaintiff McHugh is entitled to damages you should not base your verdict upon the theory or conclusion that said McHugh has been permanently incapacitated for the reason that there is no evidence in this case that said McHugh has been permanently incapacitated in his earning power." (P. R. p. 403).

XLVII.

The Court erred in failing and refusing to give defendant's supplemental requested instruction No. 6, as follows:

"I instruct you that you cannot find the defendant Alaska Steamship Company guilty of negligence in this case unless you find from a preponderance of the evidence that it had knowledge of the defect, if any, in the coal tub or bucket being used by McHugh or that it should have, in the exercise of ordinary

care, acquired such knowledge. I instruct you that it is a rule of law that the master is not usually liable for latent defects, nor is he liable for defects arising so short a time prior to the accident, if any, as not to have been discovered by him in the course of his reasonable inspections. In this case the Alaska Steamship Company is known as the "master," and the plaintiff McHugh is known as the "servant." (P. R. p. 404).

XLIX.

The Court erred in giving its certain instruction numbered 8, which is as follows:

"You are instructed that every common-carrier engaged in trade or commerce in the Territory of Alaska, shall be and is liable to any of its employees for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, appliances and machinery; and you are also instructed that in all actions brought against any common-carrier to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery by the employee where his contributory negligence was slight and that of the employer was gross in comparison. But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury." (P. R. 420).

L.

The Court erred in giving its certain instruction numbered 9, which is as follows:

"You are further instructed that in this case the defendant the Alaska Steamship Company, is liable to the plaintiff for all damages which may have resulted to him from the negligence of the defendant or by reason of any defect or insufficiency due to its negligence in its appliance, machinery, ways or works, causing the injury to his person, if any, so alleged to have been received by him on March 8, 1922, while so employed by the defendant in unloading and discharging coal from defendant's steamship, the Latouche, onto the wharf or dock at Ketchikan, Alaska." (P. R. p. 420-421).

LI.

The Court erred in giving its certain instruction numbered 10, which is as follows:

"If you should find from the evdience, however, that the plaintiff was guilty of any contributory negligence in causing the injury complained of, you are hereby instructed that such contributory negligence shall not bar a recovery by him in this case, where his contributory negligence was slight and that of the defendant was gross in comparison. If you should find that the plaintiff was guilty of contributory negligence at the time of the alleged injury, it would then be your duty to determine from the evidence in the case whether his contributory negligence was slight in comparison with that of the defendant, and to diminish the damages, if any, to be allowed to the plaintiff in proportion to the amount of the negligence attributable to the plaintiff in comparison with the combined negligence of the plaintiff and of the defendant, and to return a verdict accordingly." (P. R. p. 421).

LII.

The Court erred in giving its certain instruction numbered 11, which is as follows:

"You are instructed that no person shall recover damages from a common-carrier under the laws in force in Alaska for personal injury to himself, where the injury was done by his own consent, or was caused by his own negligence, without any negligence on the part of the defendant; but where the plaintiff and defendant are both at fault, the plaintiff may still recover, provided he could not, by the exercise of ordinary care, have prevented the injury, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such plaintiff employee." (P. R. p. 421).

LIII.

The Court erred in giving its certain instruction numbered 14, which is as follows:

"The jury are instructed that contributory negligence is the negligent act of a plaintiff which, concurring and cooperating with the negligent act of a defendant, is the proximate cause of the injury. If you shall find that the plaintiff was guilty of contributory negligence, the act of Congress under which this suit is brought provides that such contributory negligence is not to defeat a recovery altogether, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution

of damages in proportion to his negligence, as compared with the combined negligence of himself and the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence." (P. R. pp. 422-423).

LIV.

The Court erred in giving its certain instruction numbered 15, which is as follows:

"The statute under which this suit is brought makes the defendant liable to the plaintiff for all injuries suffered by the plaintiff because of its negligence, or that of any of its officers, agents or other employees. Therefore, as a matter of law, the negligence of any officer, agent or employee of the defendant, other than the negligence of the plaintiff himself, is the negligence of the defendant, for which it would be liable." (P. R. p. 423).

LV.

The Court erred in giving its certain instruction numbered 16, which is as follows:

"The plaintiff in this case alleges that the injury he suffered, if any, was caused by the negligence of the defendant in failing to furnish a safe and well-lighted place for him to work in, and safe appliances and equipment with which to work, whereby, he was injured.

"On this branch of the case, the Court instructs you that an employer does not guarantee the absolute safety of the place where the employee works; but it is the duty of the employer to exercise ordinary and reasonable care in providing a safe place for the employee

to work in, and this duty cannot be delegated to a servant, so as to exempt the employer from liability for injuries caused to another servant by its omission. The servant or employee does not undertake to incur the risks arising from the negligence in providing or maintaining a suitable and safe place for his work. His contract implies that, in regard to this matter, his employer will exercise due care in making adequate provision that no danger shall ensue to him. It was the duty, therefore, of the defendant and its officers, agents and employees in charge of the work on the steamship Latouche at the time of the injury to plaintiff, resulting from the employment of the plaintiff as a laborer in such work, to exercise reasonable care in properly lighting the place where plaintiff was required to work, and if the jury shall find by a fair preponderance of the evidence that the plaintiff was so injured on the defendant's steamship Latouche on March 8, 1922, while so unloading and discharging coal therefrom, and that the place where he was required to work was dark and badly lighted, and that the condition of the light prevented the plaintiff from discovering the defective condition of the appliance with which he was working, if you find that the appliance was defective, whereby he was injured, you should find a verdict for the plaintiff." (P. R. pp. 423-425).

LVI.

The Court erred in giving its certain instruction numbered 17, which is as follows:

"The Court further instructs the jury that it was the duty of the defendant steamship company, its officers, agents and employees having charge of the work in which plaintiff

was engaged when he was injured, to furnish to the plaintiff who was in his employ, such tools, appliances, tubs and other instrumentalities as were reasonably safe for the purpose for which they were used; and the Court instructs the jury that if they believe from a fair preponderance of the evidence in this case, that the defendant steamship company or its officers, agents or employees in charge of said work furnished plaintiff with an iron tub to be used in the performance of his duties as such employee, which it knew to be defective, or which its officers, agents, or employees whose duty it was to superintend the plaintiff's work, knew to be defective, or which, by the exercise of reasonable diligence the defendant or its officers, agents or employees superintending said work might have known to be defective and liable to drop the handle of the said iron bucket when so being used in said work, and that in consequence of said defect the plaintiff, while exercising ordinary care, was injured while in the performance of his duties, then the jury should find a verdict for the plaintiff." (P. R. p. 425).

LVII.

The Court erred in giving its certain instruction numbered 19, which is as follows:

"One of the defenses in this case is that the plaintiff being of full age and experienced in the work of unloading and discharging coal from a steamship unto a wharf or dock at Ketchikan, Alaska, assumed the risks of the employment and cannot recover for that reason.

"On that branch of the case the jury are instructed that the plaintiff assumed only the

risks of injury which were ordinarily incident to the employment in which he was engaged; and you are further instructed, in this connection, that by the use of the expression 'a risk ordinarily incident to the employment' is meant a risk of injury that does not arise or grow out of any act of negligence on the part of the defendant or its servants, and that whenever a risk is created by an act of negligence on the part of a steamship company operating as a common-carrier, or its employees, this is not a risk ordinarily incident to the employment; and if any injury came to plaintiff by reason of any negligence of defendant or its employees, otherwise than his own negligence, if any, this would not be a risk which he assumed as incident to his employment." (P. R. pp. 426-427).

LVIII.

The Court erred in giving its certain instruction numbered 20½, which is as follows:

"There is this difference between the defense of contributory negligence and that of assumption of risk. Contributory negligence is the omission of the employee to use those precautions for his own safety which ordinary prudence requires; while assumption of risk is the doctrine that in the absence of such obvious dangers as no ordinarily prudent person would incur, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects.

"The jury, in the case of defense of contributory negligence, should compare the negligence of the parties, if any shown, and such defense is not a bar to plaintiff's recovery, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages should be diminished by the jury in proportion to the amount of the employee's negligence.

"If the jury, on the other hand, find that the plaintiff assumed the risk of his employment under the instruction I have given you, then such finding would be a bar to plaintiff's recovery and your verdict should be for the defendant." (P. R. pp. 428-429).

LIX.

The Court erred in giving its certain instruction numbered 21, which is as follows:

"The jury is instructed that if you shall find a verdict for the plaintiff in this case, it will be your duty to assess the damages which he has sustained, not to exceed the sum of Ten Thousand Dollars demanded in his complaint. The damages, if any, in this case, cannot be exemplary; that is, given by way of example or punishment, but must be limited to actual or compensatory damages; and in estimating their amount you should take into consideration the monetary loss, if any, sustained by plaintiff through inability to work during the periods of his incapacity and probable incapacity alleged in the complaint, also the condition of his health and physical ability to labor, before the accident complained of, as compared with the present condition thereof and how far the injury is probably permanent in its character and results, as well as the mental and physical

suffering he has suffered, if any, by reason of the injury; and you will allow such damages as in your opinion will fairly and justly compensate plaintiff for all the injury and loss and suffering, physical and mental, sustained by him, as the direct and proximate results of the accident, not to exceed the amount demanded in the complaint." (P. R. p. 429).

LX.

The Court erred in receiving and filing herein the verdict of the jury in favor of the plaintiff and against the defendant. (P. R. p. 16).

LXI.

The Court erred in entering judgment herein in favor of the plaintiff and against the defendant, which said judgment was entered herein on April 4, 1923, in favor of the plaintiff and against the defendant, for the sum of $4,750.00. (P. R. p. 17).

POINTS.

We regret that duty compels us to present so large a number of assignments, but in our view of the law and the facts the errors committed at the trial were not only numerous but also so prejudicial to defendant as to permit no recourse other than to present them in their entirety to this Court. Their discussion, logically as we believe, falls within the scope of a comparatively few legal principles, viz.:

1. Opinion evidence, that the appliance with which plaintiff worked was dangerous, was irrelevant and inadmissible.

2. Evidence of plaintiff's pecuniary condition and financial embarrassment was irrelevant and inadmissible.

3. Evidence of an accident occurring after plaintiff's injury was irrelevant and inadmissible.

4. Evidence of changes, repairs and precautions subsequent to plaintiff's injury was irrelevant and inadmissible.

5. The defendant was entitled to cross-examine plaintiff's witness as to the positiveness of his testimony.

6. The defendant was entitled to offer evidence in rebuttal of plaintiff's evidence.

7. Instructions must be based upon evidence and not upon abstract propositions of law.

8. The Act of June 11, 1906, ch. 3073, 34 Stat. L. 232, known as the First Employer's Liability Act, was inapplicable to this case.

9. The common law doctrine of assumption of risk applies to cases arising under the First Employer's Liability Act.

10. Contributory negligence is a bar to a recovery under the First Employer's Liability Act, except where the employee's negligence is slight

and the employer's negligence is gross in comparison thereto.

11. Under the First Employer's Liability Act there is no liability without negligence.

12. The Court should have directed a verdict for the defendant.

ARGUMENT.

I.

OPINION EVIDENCE, THAT THE APPLIANCE WITH WHICH PLAINTIFF WORKED WAS DANGEROUS, WAS IRRELEVANT AND INADMISSIBLE.

(A) Special knowledge was unnecessary to know whether the coal tub was a dangerous or a safe appliance.

Plaintiff's witness Young stated that it was perfectly apparent to him why the bucket dumped on the first occasion (P. R. p. 72). Plaintiff's witness Soderberg testified that a look told him of the defect (P. R. pp. 160, 161, 167). Plaintiff's witness Klemm testified that he could have ascertained the defect without any light at all, that he could feel it (P. R. p. 187), indicating that the defect was so apparent and the mechanism so simple that he did not even have to see it to have knowledge of it.

Plaintiff claimed that he was a ~~master~~ plumber by trade; had held nearly every position in a mine; had put in an air ventilation system in a compressor room; had done axe work in connection with the bulding of bridges and culverts; had done station work on the railroad with pick and shovel and wheelbarrow; had worked on freight cars unloading sacks of ore with a hook into a sling or wire netting; had worked in a logging camp, had bucked and split wood and fired a donkey engine; had been a carpenter's helper; had shovelled rock; had actually done plumbing; had done pipe fitting in a mine; was in business for himself as a plumber in Seattle and Vancouver; and that he had seen coal buckets before, but he had never worked with one (P. R. pp. 189-204).

Plaintiff's own testimony discloses not only an intelligence amply sufficient to comprehend and appreciate the coal bucket, its character, use and operation, and the dangers and risks incident thereto, but a special knowledge based upon wide experience of the use of various tools, ranging from the use of shovel and pick to the use of tools of the carpenter helper and the master plumber. If special knowledge was necessary to know the nature of a coal tub, then can plaintiff conscientiously deny that his experience—he had done even the skilled work of plumbing and pipe fitting—was not more than sufficient to give him that special knowledge. Strangely enough, his ignorance permitted him to

notice the wheels of the coal tub (P. R. p. 274). He saw them easily enough. Why, then, could he not just as easily see the bail and trigger of the coal tub? They were apparently just as easily to be seen, as the witness Soderberg stated that there was nothing about the tub that could not be easily seen, and that there was no concealed mechanism. (P. R. p. 173).

Under these circumstances did not the Court err in permitting, over defendant's objection, the witness Young (Assignment No. 1, p. 5 herein; P. R. pp. 74-75), the witness Gillis (Assignment No. 12, p. 9 herein; P. R. p. 151), the witness Soderberg (Assignment No. 14, p. 9 herein; P. R. p. 162-163), and the witness Klemm (Assignment No. 16, p. 10 herein; P. R. pp. 179-180), to give their opinion to the jury as to whether or not the coal bucket was a dangerous or a safe appliance.

(B) The facts alone should have been described to the jury and the conclusion left for them to draw.

The Court in permitting this evidence clearly erred as the witnesses should have been confined to facts and not allowed to venture into conclusions. As to the principle of law applicable, we see no difference between the facts of this case and the facts in *Spokane and I. E. R. Co. v. U. S.*, 210 Fed. 243, L. R. A. 1917A, 558, 563, affirmed 241 U. S.

344, 60 L. ed. 1037, wherein this Court held that a question of similar import was not properly the subject of expert testimony.

No technical learning was required to disclose the condition of the object under consideration; the tub was a common thing of ordinary construction, and the simplicity of common sense would have been a safer guide to its comparative safety or dangerousness than the niceties of technical or expert knowledge. The jury was, therefore, the best judge as to whether it was a dangerous or a safe appliance. To this effect see:

Harrington v. R. Co., 118 N. E. 880, 2 A. L. R. 1063;

Weller v. Camp, 28 L. R. A. (N. S.) 1106, 52 So. 929;

Siegel C. & Co., v. Treka, 2 L. R. A. (N. S.) 647, 75 N. E. 1053;

McKim v. Philadelphia, 19 L. R. A. (N. S.) 506, 66 Atl. 340;

Detzur v. Brewing Co., 44 L. R. A. 500 (Mich.);

Coe v. Van Why, 80 P. (Colo.) 894.

II.

EVIDENCE OF PLAINTIFF'S PECUNIARY CONDITION OR FINANCIAL EMBARRASSMENT WAS IRRELEVANT AND INADMISSIBLE.

Over the objection of defendant, the plaintiff himself was permitted to answer the question: "Will you state to the jury, then, Mr. McHugh, why you have had to receive contributions or charity from other people, since the 8th or 9th day of March, 1922?" (Assignment No. 18, p. 11 herein; P. R. pp. 216-219), or, in other words, the plaintiff was permitted to testify that ever since the accident he had been poverty stricken and dependent for his livelihood upon the charity of others. If the real object of the question was to ascertain whether or not the plaintiff had been able to do any work since the accident, a form of question peculiarly adapted to arousing the prejudices of the jury was adopted for eliciting that information. The question, moreover, was put after repeated objections by defendant to that line of evidence (P. R. pp. 217-218). To the question, plaintiff answered: "I had to receive money for the reason that I was unable to limp fifty yards in any half hour from the time I left the hospital for a few months after I left the hospital. I was unable to work and I had no money; at the time I left the hospital, I had only $28.00 of my own and the money I received afterwards, of course, I had to borrow it; that I must have in order to live." (P. R. p. 219).

The evidence is clearly within the scope of the language of the United States Supreme Court, viz.:

> "This evidence was obviously irrelevant. The plaintiff, in view of the pleadings and evi-

dence, was entitled to compensation and nothing more, for such damages as he had sustained in consequence of injuries received. But the damages were not, in law, dependent in the slightest degree upon his condition as to wealth or poverty."

Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141, 145.

While the decision of the Federal Supreme Court pointedly indicates the error thus committed, there are many other cases of eminent authority to the same effect. Among them, are:

Biscuit Co. v. Nolan, 138 Fed. 6 (8th C. C. A.);

Union Pac. R. Co. v. McMican, 194 Fed. 393;

LaCorazza v. Cantalupo, ~~214~~ 210 Fed. 875, (2nd C. C. A.);

Cauble v. R. R. Co., 216 Fed. 712;

Steinberger v. Cal. Elec. Gar. Co., 168 P. 570.

III.

EVIDENCE OF ACCIDENT HAPPENING AFTER PLAINTIFF'S INJURY WAS IRRELEVANT AND INADMISSIBLE.

Over the objection of defendant, plaintiff's witness Soderberg was permitted to testify as to another accident occurring subsequently to defendant's injury. The objectionable question: "How

was he hurt?" followed the answer of the witness: "There was another man hurt about half an hour later on, probably an hour and a half." Not until that answer had been uttered, could it be foreseen that the testimony embraced a period of time subsequent to paintiff's accident. Defendant's counsel promptly objected to the question, but was overruled, and the witness answered: "The same as Barney, only I think the bail took hm further upon the leg. They got this man out of the hold and I seen him a couple of days later. He was limping around and I have seen him since." The latter part of the answer was then stricken on defendant's motion (Assignment No. 15, p. 10 herein; P. R. p. 164).

We submit that this evidence could in no wise establish defendant's negligence, and that its only result and purpose were to prejudice the jury, to distract their attention from the real issues, and not to disclose any actual responsibility for the injury to plaintiff. The testimony is well within the objectionable features outlined by the Federal Supreme Court in *Columbia R. R. Co. v. Hawthorne*, 144 U. S. 202, 207.

Similar evidence was properly stricken in the opinion of the Michigan Supreme Court, which said:

> "In *Lomar v. Village of East Tawas*, 86 Mich. 14, 48 N. W. 947, it was permitted to be shown that others had stepped into the same

hole prior to plaintiff's injury, for the purpose of showing the existence of the defect at the time the injury occurred; and it was said that such evidence was competent, as it might also tend to show constructive notice of the defect to the village. It was further said in that case that there was some conflict of authority even upon this right. We have been unable to find any case going beyond this ruling, and holding that a plaintiff upon such a trial might introduce proof that others fell or stepped into the hole *after the injury* occurred, even with a showing that it was in the same condition as when plaintiff was injured."

McGrail v. Kalamazoo, 53 N. W. (Mich.) 955, 956.

"Evidence of accidents happening after the injury to plaintiff is not admissible."

29 CYC. 613.

"It is not permissible, however, to prove that others stumbled in the same place after the accident."

Branch v. Klatt, 138 N. W. (Mich.) 263, 264.

IV.

EVIDENCE OF CHANGES, REPAIRS, AND PRECAUTIONS SUBSEQUENT TO PLAINTIFF'S INJURY WAS IRRELEVANT AND INADMISSIBLE.

This general principle is stated by CYC in the following language:

"While some courts hold to the contrary, the great weight of authority is that evidence

of changes or repairs made subsequently to the injury, or as to precautions taken subsequently to prevent recurrence of injury, is not admissible as showing evidence or as amounting to an admission of evidence."

29 CYC 616.

The leading case on this subject is from the United States Supreme Court. The writ of error before that court directly presented for decision the question whether, in an action for injuries caused by a machine alleged to be negligently constructed, a subsequent alteration or repair of the machine by the defendant is competent evidence of negligence in its original construction. The Court said:

"Upon this question there has been some difference of opinion in the courts of the several states. But it is now settled, upon much consideration, by the decisions of the higher courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant has been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant. * * * *

"The only states, so far as we are informed, in which subsequent changes are held to be evidence of prior negligence, are Pennsylvania and Kansas, the decisions in which are supported by no satisfactory reasons. * * * * ."

Columbia R. R. Co. v. Hawthorne, 144 U. S. 202, 207.

hole prior to plaintiff's injury, for the purpose of showing the existence of the defect at the time the injury occurred; and it was said that such evidence was competent, as it might also tend to show constructive notice of the defect to the village. It was further said in that case that there was some conflict of authority even upon this right. We have been unable to find any case going beyond this ruling, and holding that a plaintiff upon such a trial might introduce proof that others fell or stepped into the hole *after the injury* occurred, even with a showing that it was in the same condition as when plaintiff was injured."

McGrail v. Kalamazoo, 53 N. W. (Mich.) 955, 956.

"Evidence of accidents happening after the injury to plaintiff is not admissible."

29 CYC. 613.

"It is not permissible, however, to prove that others stumbled in the same place after the accident."

Branch v. Klatt, 138 N. W. (Mich.) 263, 264.

IV.

EVIDENCE OF CHANGES, REPAIRS, AND PRECAUTIONS SUBSEQUENT TO PLAINTIFF'S INJURY WAS IRRELEVANT AND INADMISSIBLE.

This general principle is stated by CYC in the following language:

"While some courts hold to the contrary, the great weight of authority is that evidence

of changes or repairs made subsequently to the injury, or as to precautions taken subsequently to prevent recurrence of injury, is not admissible as showing evidence or as amounting to an admission of evidence."

29 CYC 616.

The leading case on this subject is from the United States Supreme Court. The writ of error before that court directly presented for decision the question whether, in an action for injuries caused by a machine alleged to be negligently constructed, a subsequent alteration or repair of the machine by the defendant is competent evidence of negligence in its original construction. The Court said:

"Upon this question there has been some difference of opinion in the courts of the several states. But it is now settled, upon much consideration, by the decisions of the higher courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant has been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant. * * * *

"The only states, so far as we are informed, in which subsequent changes are held to be evidence of prior negligence, are Pennsylvania and Kansas, the decisions in which are supported by no satisfactory reasons. * * * * ."

Columbia R. R. Co. v. Hawthorne, 144 U. S. 202, 207.

The spirit of this rule was violated no less than *four* times by the erroneous admission of evidence at the trial hereof.

Over defendant's objection, plaintiff's witness Williams was permitted to answer the question: "Was there any change made in the bucket after Barney was hurt?" (Assignment No. VI, p. 6 herein; P. R. p. 138). The witness answered: "Well, not very long afterwards they took the bucket and laid it aside—the same bucket I was working on. That left four men to the bucket and they put me on the hook. They worked quite a ways under the hatch and I dragged the hook to hook on to the other buckets." Here the defendant's precautionary measure of laying the bucket aside was converted into a prejudicial circumstance of prior negligence.

Over defendant's objection, plaintiff's witness Gillis was permitted to answer the question: "Why did the handle fall that time?"—referring to an occasion subsequent to plaintiff's accident (Assignment No. XI, p. 8 herein; P. R. p. 150). Witness answered: "Oh, it come unhooked." Here, the fact that on a later occasion the handle fell and became unhooked is made proof of defendant's negligence at the time that the handle had struck plaintiff.

Over defendant's objection, plaintiff's witness Williams was permitted to answer the question: "How long was that bucket used after Barney was

hurt?" (Assignment No. III, p. 6 herein; P. R. p. 137). The answer: "I don't know just how long after," is indefinite as to time, but in its indefiniteness clearly carries the prejudicial impression that some defect existed in the bucket because of defendant's negligence and that defendant subsequently admitted that prior negligence by laying the bucket to one side.

Over defendant's objection, plaintiff's witness Gillis was permitted to answer the question: "How long did you work with it?"—referring to the time the bucket was used after the accident. (Assignment No. VIII, p. 7 herein; P. R. p. 149). The witness' answer: "It wasn't over two hours at the most," again carried the prejudicial impression that the cessation of use of the bucket necessarily proved defendant's negligence.

We urge that by this evidence defendant's adoption of the safeguard of discarding the use of the bucket after the accident was erroneously converted into an admission of prior negligence, contrary to the true rule expressed in *Morse v. M. & St. L. Ry.*, 30 Minn. 465, and approved by the Federal Supreme Court in *Columbia R. R. Co. v. Hawthorne, supra.*

All of the testimony elicited over defendant's objections from the plaintiff's witness Gillis (Assignments Nos. IX and X, pp. 7, 8 herein; P. R. pp. 149-150) is subject to this same fundamental error.

Reference is made to this evidence as it appears in the record, it being too lengthy to otherwise than comment upon here generally, but it is respectfully urged that the record clearly shows that all of this particular testimony was received over defendant's objections, and that it clearly relates to matters subsequent to plaintiff's accident.

V.

THE DEFENDANT WAS ENTITLED TO CROSS EXAMINE PLAINTIFF'S WITNESS AS TO THE POSITIVENESS OF HIS TESTIMONY.

Section 1498, C. L. A., 1913, provides:

> "The adverse party may cross examine the witness as to any matter stated in his direct examination or connected therewith, and in doing so may put leading questions; but if he examine him as to any other matters, such examination shall be subject to the same rules as a direct examination."

The Court refused to permit plaintiff's witness Young to answer on cross examination the question: "Do you feel as positive of that" (referring to the position of the men working on the ship) "as anything else you have said in your testimony?" (Assignment No. II, p. 6 herein; P. R. p. 126). The witness Young had theretofore testified as to the position of the men working on the ship (P. R. p. 126), and had been called to the stand, as shown by his evidence, by the plaintiff

for the purpose of setting the entire stage of facts upon which plaintiff's case rested.

Clearly there was nothing incompetent in the question, and defendant was entitled to know the degree of certainty that the witness had as to the matters concerning which he testified. The Court, however, denied defendant that right.

The general principle of law on this subject is:

> "A witness may be interrogated as to his certainty concerning the matters about which he has testified or be asked whether he is positive about a matter which he has not stated positively in his direct examination."
>
> 40 CYC. 2490.

In a case arising in Michigan, the witness was asked the question: "Is there any doubt existing in your mind that the man who was standing at the right side of Rutan at the time you looked through was this defendant Wallin?" An objection to the question as being incompetent was overruled. On this subject, the Michigan Supreme Court, speaking through its Chief Justice, the eminent jurist Cooley, said:

> "It sought to bring out, it is said, not what the witness saw at the time and the impression then made, but the conclusion to which he had subsequently arrived. This conclusion might depend much upon the character of the witness. With one person the impression might strengthen until it became a certainty in the mind; with another, reflection might remove it. But, while this may be true,

we think the question unobjectionable. The witness had testified that he thought the man he saw was Wallin. If he, when testifying, had any doubts of the identity, it was proper to ascertain the fact; if he had none, the grounds of his belief might be inquired into. The jury were entitled to know what the witness knew respecting the identity, and how positive his knowledge was. If he was speaking doubtfully they should know it, and if with confidence it was proper they should know the grounds of his confidence."

People v. Wallin, 22 N. W. (Mich.) 15 at 17.

VI.

THE DEFENDANT WAS ENTITLED TO OFFER EVIDENCE IN REBUTTAL OF PLAINTIFF'S EVIDENCE.

The Court refused to permit defendant's witness Story to answer the question: "If the patient complains at this time of a soreness and swelling in the first metatarsal bone, what, in your opinion, would cause that to exist at this time?" (Assignment No. 24, p. 11 herein; P. R. p. 345), and the question: "Well, Doctor, if the patient complains of a soreness there now, can you express an opinion as to whether that would be due to the original injury or to some intervening cause after his discharge from the hospital?" (Assignment No. 25, p. 12 herein; P. R. p. 345). Dr. Story was the physician who first treated the plaintiff P. R. p. 224), and he stated that

plaintiff's injury was healed when plaintiff was discharged from the hospital (P. R. p. 337, 338), and that he found no injury on the first metatarsal bone at the time of his treatment of plaintiff (P. R. p. 344).

Plaintiff's medical witness Mustard had testified on plaintiff's case in chief that plaintiff complained of some inflammation in the first metatarsal bone, but that he did not see the foot until after the injury (P. R. pp. 233, 234). Even so, Dr. Mustard expressed his opinion that the condition was apparently due to the injury (P. R. p. 236). Such being the status of the record, it was unjust and erroneous to deny the defendant the right to ascertain from its witness—the original medical attendant upon the plaintiff—his opinion as to the cause of the condition in the first metatarsal bone. If plaintiff was entitled to the benefit of the opinion of his medical witness as to the cause of the condition of that bone, then, we submit, that the defendant was entitled to the opinion of its medical witness as to the cause of that condition.

38 CYC. 1343.

VII.

INSTRUCTIONS MUST BE BASED UPON EVIDENCE, AND NOT UPON ABSTRACT PROPOSITIONS OF LAW.

The statutory law governing the giving of the instructions in this case, so far as pertinent, is:

"When the jury has been completed and sworn, the trial shall proceed in the order prescribed in this section, unless the court for special reasons otherwise direct:

"* * * * *" (Note: paragraphs 1 to 5 omitted).

"Sixth. The court shall then charge the jury, and if either party requires it, and shall at the commencement of the trial give notice of his intention so to do, the charge of the court, so far as it relates to the law and the facts of the case, shall be reduced to writing and given to the jury by the court as written, without any oral explanation. The charge, when reduced to writing, must be filed with the clerk."

Sec. 1019, C. L. A. 1913.

"In charging the jury the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact."

Sec. 1023, ibid.

There is neither under these nor any other statutes, so far as we are informed, any authority for the trial court to give to the jury instructions, however correct as abstract propositions of law, which are not based on evidence. Such is, we submit, the general principle of law, and such has been the ruling of the Supreme Court of Oregon, from which state these statutes came.

"We have held it to be error for the trial court to give to the jury instructions, however

correct as abstract propositions of law, if not based on evidence."

Woodward v. O. Ry. & N. Co., 22 P. (Ore.) 1076, 1080.

To the same effect, see:

Roberts v. Parrish, 22 P. (Ore.) 136, 138;

State v. Hogg, 129 P. (Ore.) 115, 116.

This Honorable Court has had occasion to reaffirm this doctrine.

"The difficulty in the way of giving this instruction was that there was no testimony which warranted it. There is nothing in the evidence to show that Wert was serving upon American vessels prior to March, 1901."

Holmgren v. U. S. 156 Fed. 439, 445.

Over defendant's objection the Court charged upon the hypothesis that there was evidence to go to the jury as to the place of work being dark and badly lighted (Assignment No. 55, p. 24 herein; P. R. pp. 423-425). An examination of the record will not disclose, we believe, any evidence upon which to base the instruction. Plaintiff's witness Klemm testified that there was plenty of light in the hold (P. R. p. 182). Plaintiff's witness Young testified that the lights in the hold were sufficient to cause a glare and that he presumed that the place of work of the longshoremen was illuminated (P. R. pp. 76, 132). Defendant's witness Pollow testified that the lights were sufficient to make it very bright where the men were work-

ing (P. R. p. 302). Plaintiff himself testified that it was pretty easy to see from a distance the rollers or wheels underneath the tub (P. R. p. 274, 275), plainly indicating that there was ample light in which to see them.

The Court also charged the jury to consider how far the injury was probably permanent in its character and result (Assignment No. 59, p. 28 herein; P. R. p. 429); thus placing before the jury the issue raised by plaintiff's complaint that he was injured in a permanent way (P. R. p. 4), and that his earning capacity had been permanently reduced by one-half or more for life (P. R. p. 5). Our contention, that there was no evidence in support of this issue, is corroborated, we believe, by the words of the learned trial court itself in the course of the trial (P. R. p. 280).

There being no evidence, these charges necessarily were erroneous as they placed before the jury issues which unavoidably prejudiced defendant in three essentials: (a) the condition of the place of work, (b) the permanency of the injury, and (c) the permanency of incapability of earning power. We submit this was error: cases cited, supra; 38 CYC 1612, 1671.

There being no evidence to support these issues raised by the pleadings, defendant requested instructions that would eliminate those issues, viz.: that there was no evidence that the plaintiff had

been permanently injured (Assignment No. 45 p. 19 herein; P. R. p. 403), and that there was no evidence that the plaintiff had been permanently incapacitated in his earning power (Assignment No. 46 p. 20 herein; P. R. p. 403-4). This request was denied, and in refusing the instructions error was committed. 38 CYC 1621.

As to the principle involved in the erroneous giving and refusal of these several instructions, see also: *Hall v. McKinnon*, 193 Fed. 572; *Cavoretto v. Alaska Gastineau M. Co.*, 245 Fed. 853, *Port Wells Mill & Lumber Co. v. Crawford*, 264 Fed. 935.

VIII.

THE ACT OF JUNE 11, 1906, CH. 3073, 34 STAT. L., KNOWN AS THE FIRST EMPLOYER'S LIABILITY ACT, WAS INAPPLICABLE TO THIS CASE.

(A) The Act of June 11, 1906, *was repealed by the Act of April* 22, 1908.

In 1907 the Act of June 11, 1906, was declared unconstitutional by the United States Supreme Court in attempting to include in its operation all employees of interstate carriers as well as those engaged in intrastate as those engaged in interstate traffic. Employer's Liability Cases, 207 U. S. 463, 53 L. ed. 297. Soon after the rendition of the adverse decision the President addressed Congress in respect thereto as follows:

> "As regards the employer's liability law, I advocate its immediate re-enactment limiting its scope so that it will apply only to the class of cases as to which the Court says it can constitutionally apply, but strengthening its provisions within its scope."
>
> Cong. Rec. 60th Cong. 1st Section, 1347.

Congress promptly enacted the Second Federal Employer's Liability Act of April 22, 1908, and eliminated therefrom the objectionable features that rendered it unconstitutional, making it applicable to the class of cases to which it could constitutionally apply.

A comparison of the verbiage of the two acts clearly demonstrates Congress' intention by the Second Act to repeal the First Act. Section 1 of the First Act provides:

> "That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars,

engines, appliances, machinery, track, roadbed, ways, or works."

Sec. 1, Act of June 11, 1906, ch. 3073, 34 Stat. L. 232.

Plainly thereby Congress dealt, first, with trade or commerce in the District of Columbia and the Territories, and, second, with interstate commerce, commerce with foreign nations and between the territories and the states. *El Paso &c. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106.

In the Second Act Congress used two separate sections in which to cover these two classes of localities—apparently with a view of preventing the Act being declared void as a whole by reason of the possible invalidity of the provisions relative to one or the other of the classes of localities. These two sections provide:

"That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury

or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

"That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Sections I and II, Act of April 22, 1908, ch. 149, 35 Stat. L. 65.

Section 2 of the First Act is practically identical with Section 3 of the later Act, except that in the First Act Congress recognizes comparative degrees of negligence and restricts contributory negligence to not being a bar to recovery only where the employee's negligence was slight and that of the employer was gross in comparison; whereas in the

second act contributory negligence, regardless of degree, acts not in bar but only in proratable diminution of damages.

Section 4 of the Second Act restricting in certain cases the common law doctrine of assumption of risk has no equivalent in the First Act.

Section 5 of the Second Act, while not in the same language, is undoubtedly of the same legal purport as Section 3 of the First Act. Section 6 of the Second Act, as originally enacted, provides a limitation of two years whereas Section I of the First Act provides a limitation of one year. Section 7 of the Second Act provides that the term "common carrier" shall include the receiver or other person conducting the business.

Section 5 of the First Act provides:

> "That nothing in this Act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety appliance Act of March 2, 1893, as amended April 1, 1896, and March 2, 1903."

Section 8 of the Second Act provides:

> "That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to effect the prosecution of any pending proceeding or right of action under the Act of Congress" of June 11, 1906—the first employers liability Act.

The elimination of the words "by railroads" in Section 8, supra, of the subsequent act must

have had some purpose. Inasmuch as the second Act was being limited to railroad common carriers (*Southern P. Co. v. Jensen*, 244 U. S. 205, 212, 61 L. ed. 1086, 1097), whereas the first Act had extended to all common carriers (Employer's Liability Cases, supra), Congress, by the elimination of those words in the second act, laid emphasis upon the repeal of the all common carrier act by the railroad common carrier act; otherwise, the statute limited to railroad common carriers would not have expressly pointed out that such act should not limit the duty or liability of other common carriers. But that there might be no question of this repeal, Congress specifically limited the act in its effect upon any proceeding or right of action under the Act of June 11, 1906, to such as were *pending* under that act. Could language be more clear that Congress thereby announced that the first clause of Section 8, supra, should not be construed to mean that the Act of April 22, 1908, did not repeal the Act of June 11, 1906.

So far as we are informed, the United States Supreme Court has never had occasion to directly pass upon the question as to whether or not the Act of June 11, 1906, was so repealed by the Act of April 22, 1908. In *Philadelphia B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56 L. ed. 911, 915, Mr. Justice Hughes described the First Employer's Liability Act in a mode of speech customarily indi-

cative of something that has gone before or past, to-wit:

> "The *former* Act of June 11, 1906, which was valid as to employees engaged in commerce within the District of Columbia * * * *contained* explicit provision that such a contract or the acceptance of benefits thereunder should not defeat the action. Section 3 of that Act *was* as follows: * * * * *.
>
> "But it is urged that the *substituted provision*—of Section 5 of the Act of 1908—failed to embrace that which the *earlier* act specifically described. We cannot assent to this view. The evident purpose of Congress was to enlarge the scope of the section, and to *make it* more comprehensive by a generic, rather than a specific, description."

This language impresses us that the United States Supreme Court considers that the first employer's liability act was repealed by the Second Act.

The Act of April 22, 1908, expressly applies to Porto Rico. *R. R. Co. v. Birch*, 224 U. S. 547, 555, 56 L. ed. 879, 882; *R. R. v. Didricksen*, 227 U. S. 145, 148, 57 L. ed. 456, 457; hence, if the Act of June 11, 1906, was not repealed by the Act of April 22, 1908, in the Territory of Alaska common carriers by railroad are subject to the provisions of both acts.

Practically alike in most features, those two acts are essentially distinct so far as the application of the defense of contributory negligence: under the second Act contributory negligence, regardless of

degree, is not a bar to recovery; under the former Act an employee's contributory negligence of a degree equal to or greater than the employer's is a bar to a recovery, and the first Act contains no limitation of the common law doctrine of assumption of risk. Hence, an employee of a common carrier by railroad in Alaska, suing his employer for damages, will find himself in the quandary of not knowing under which Act he should proceed; the employer, in ignorance of under which act he could defend.

These inconsistencies in the two Acts clearly constitute the repeal by implication of the Act of June 11, 1906, by the Act of April 22, 1908. Lewis' Sutherland Stat. Const. (2d. ed.) Sec. 247.

(B) The Act of June 11, 1906, *does not affect the uniform maritime rule.*

Construing the Act of April 22, 1908, the Federal Supreme Court has held that:

> "It is unreasonable to suppose that Congress intended to change long established rules applicable to maritime matters merely because the ocean going ship concerned happened to be owned and operated by a company also a common carrier by railroad."
>
> *Southern P. Co. v. Jensen*, 244 U. S. 205, 213, 61 L. ed. 1086, 1097.

But, it may be contended, that defendant is a common carrier engaged in the coasting trade. Nevertheless, if the Act of June 11, 1906, is extant,

it is to be regarded as a local law and not as a law of the United States within the meaning of the Judicial code, and the Act, so far as constitutional, was the result of the exercise of the purely local power of Congress. *Wash., A. & Mt. V. R. R. Co. v. Downey*, 236 U. S. 190, 59 L. ed. 533.

Plaintiff was engaged in longshore work aboard a vessel located in navigable waters and his work consisted of unloading coal from the vessel (Amended Answer and Reply, P. R. pp. 6-15). He is, thus brought within the language of the Supreme Court of the United States, viz.:

> "The work of a stevedore in which the deceased was engaged is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atl. Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. ed. 1208."
>
> *Southern P. Co. v. Jensen, supra.*

Does a different rule of maritime law apply in Alaska than in the states? Mr. Justice Bradley, speaking for the United States Supreme Court relative to our maritime law, said:

> "One thing, however, is unquestionable; the constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the

> disposal and regulation of the several states as that would have defeated the uniformity and consistency at which the constitution aimed on all subjects of a commercial characater affecting the intercourse of the states with each other or with foreign states."
>
> The Lottawanna, 21 Wall. 58; 22 L. ed. 654, 662.

This customary uniformity of operation of maritime law renders it unlikely that Congress, in the exercise of its purely local power of Government over the territories and the District of Columbia intended, even if empowered to do so, to establish in maritime matters a new rule that not only differed from the long established maritime rules but which applied nowhere except in the territories and the District of Columbia. Herein is found an additional circumstance of Congress' intention by the Act of April 22, 1908, to repeal the Act of June 11, 1906. The former Act had been declared unconstitutional in respect to interstate commerce (Employer's Liability Cases, supra); the latter act applies to the territories (*R. R. Co. v. Birch, supra; R. R. Co. v. Didrickson, supra).* Shall we presume that Congress left unrepealed an Act whose application to maritime rules was local and not uniform?

In passing, it will be noted that of course the Act of April 22, 1908, does not apply hereto, because it is limited to common carriers by railroad. *Southern P. Co. vs. Jensen, supra.*

Neither does the territorial act of April 30, 1913, Chap. 45, A. S. L. 1913, entitled "An Act to fix the liability of employers for personal injuries sustained by their employees." Defendant is clearly excluded from that Act by Section 1 thereof, towit:

> "That every person, association, or corporation engaged in the business of manufacturing, mining, constructing, building, or other business or occupation carried on by means of machinery or mechanical appliances, shall be liable, &c."
>
> Sec. 1, Ch. 45, A. S. L., 1913.

In any event the Territory with its limited authority has no power to do that which a state cannot do, i.e.: destroy the uniformity of laws concerning maritime matters. *Southern P. Co. v. Jensen, supra.*

In either view of the case, that the Act of June 11, 1906, was repealed by the Act of April 22, 1908, or that the Act of June 11, 1906, does not establish a special and local maritime rule applicable only in the territories and the District of Columbia, the learned trial Court erred in refusing the defendant's instructions relative to the negligence of fellow servants constituting a bar (Assignments Nos. 41 and 42, pp. 16, 17 herein; P. R. pp. 399-400), and in giving, over defendant's exception, its instructions relative to the abrogation of the defense of fellow servants (Assignments No's. 54, 55, 56

and 57, pp. 24-26 herein; P. R. pp. 423-426), and its general instruction (Assignment No. 50 p. 21; P. R. p. 420).

IX.

THE COMMON LAW DOCTRINE OF ASSUMPTION OF RISK APPLIES TO CASES ARISING UNDER THE FIRST EMPLOYER'S LIABILITY ACT.

Defendant contends that, admitting for the purposes of argument that the circumstances of this case are governed by the Act of June 11, 1906, Ch. 3073, 34 Stat. L. 232, the learned trial court committed certain fundamental errors in its application of the provisions of that act to the case.

One of the distinctions between that Act and the Second Employer's Liability Act of April 22, 1908, Ch. 149, 35 Stat. L. 65, is that the First Employer's Liability Act is devoid of any restriction upon the common law doctrine of assumption of risk. The Act of April 22, 1908, however, contains a limitation upon the doctrine but that limitation is confined to cases where the violation by the employer of any statute enacted for the safety of employees contributed to the injury or death of such employee. *Jacobs v. So. R. Co.*, 241 U. S. 229, 60 L. ed. 970; *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062.

Inasmuch as the Act of June 11, 1906, contains no language importing a similar or any limitation upon that doctrine, we submit that that doctrine applies to cases under that Act with as unmodified vigor as at common law. *Butler v.Frazee*, 211 U. S. 459, 53 L. ed. 281, 285;*Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. ed. 1030.

(A) Plaintiff assumed the risk, of which he had knowledge or which he appreciated, attendant not only upon the appliances with which he worked but of the place in which he worked, even though arising out of defendant's negligence.

The Court charged that "the negligence of any officer, agent, or employee of defendant, other than the negligence of plaintiff himself, is the negligence of the defendant, for which it would be liable" (Assignment No. 54, p. 24 herein; P. R. p. 423). This instruction is doubtly erroneous. It takes no cognizance of the fact that the plaintiff's contributory negligence, if equal to or of a greater degree than defendant's negligence, constituted a bar to the recovery of damages or of the fact that plaintiff assumed the risks of which he had knowledge or which he appreciated, even though they arose out of the employer's negligence.

The charge left with the jury the impression that absolute liability devolved upon the defendant for the negligence of any of its officers, agents or employees. Such doctrine does not accord with the

United States Supreme Court's decisions under the Second Employer's Liability Act, which decisions, we submit, are the best authority herein. Mr. Justice Pitney, speaking for that Court, said:

> "When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

Seaboard A. L. R. Co. v. Horton, supra.

Where is the evidence in the record of any objection made by plaintiff to any appliance with which he was working or to the condition of the place in which he was working, or of any promises made by the defendant to correct any alleged defect? Can we believe that plaintiff, who is an experienced plumber by trade (P. R. pp. 203, 252), did not know and appreciate the fact that if the iron bail of the coal tub fell on him he would be injured.

The Court unqualifiedly charged that "the servant or employee does not undertake to incur the risks arising from the negligence in providing or maintaining a suitable and safe place for his work" (Assignment No. 55 p. 24 herein; P. R. pp. 423-5). This charge is inaccurate when viewed in the light of the decision of the Federal Supreme Court:

> "It is inaccurate to charge without qualification that a servant does not assume a risk created by his master's negligence, the rule being otherwise where the negligence and danger are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."
>
> *C. R. I. & P. Ry Co. v. Ward*, 252 U. S. 18, 22.

This instruction further charged that it was the defendant's duty to "exercise reasonable care in properly lighting the place where plaintiff was required to work, and if the jury shall find * * * that the place where he was required to work was dark and badly lighted, and that the condition of the light prevented the plaintiff from discovering the defective condition of the appliance with which he was working, if you find that the appliance was defective, whereby he was injured, you should find a verdict for the plaintiff." Did this not, in effect, direct a verdict for plaintiff, conditioned only upon the contingencies, that the jury find that the place of work was dark and badly lighted, that that fact

prevented plaintiff's discovering the condition of the appliance, and that the appliance was defective? The charge considered neither the factor of defendant's negligence nor the factor of plaintiff's assumption of the risks that he knew or appreciated, and which were attendant upon the place of work. *Del. L. & W. R. Co. v. Tomasco*, 256 Fed. 14, 17, certiorari denied, 251 U. S. 551; *Glenn v. C. N. O. & T. P. R. Co.*, 163 S. W. (Ky.) 461. Were not plaintiff's knowledge and experience, even if confined entirely to the period from seven o'clock of the previous evening until one o'clock of the following morning when he was injured, more than sufficient to permit him, even force him, to appreciate the simple fact that he could not see the coal tub as well in the dark as in the light? His testimony does not disclose such blind stupidity. No element is involved of an unknown pitfall or hole into which plaintiff might stumble or fall. The question as to whether darkness or light prevailed simply enters into the proposition as to whether plaintiff could see the coal tub in the dark as well as he could in the light.

The Court charged, after defining "a risk ordinarily incident to the employment," that "if any injury came to plaintiff by reason of any negligence of defendant or its employees, otherwise than his own negligence, if any, this would not be a risk which he assumed as incident to his employment." (Assignment No. 57, p. 26 herein; P. R. p.

426). The jury was thus left to infer that, if the defendant were guilty of any negligence at all or of any kind of negligence contributing to the injury, then the plaintiff assumed none of the risks incident to his employment. An instruction of very similar import was given in *Columbia & P. S. Ry. v. Sauter*, 223 Fed. 604, 610, and this court stated that an instruction to such effect was contrary to the principles of common law respecting the doctrine of assumption of risk, as reaffirmed by the United States Supreme Court in *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 504, 58 L. ed. 1062, 1070.

(B) Plaintiff assumed the dangers normally and necessarily incident to his occupation, even though the risks were extraordinary.

The foregoing authorities unqualifiedly support the doctrine that plaintiff assumed the dangers normally and necessarily incident to his occupation.

The Court's charges (Assignments 54 and 57, pp. 24-26 herein; P. R. pp. 423-427) plainly ignore that principle of law, and the latter charge limits the risks to those ordinarily incident to the employment not created by defendant's negligence.

The Court further charged (Assignment No. 58, p. 27 herein; P. R. p. 428) that "Assumption of risk is the doctrine that in the absence of such obvious dangers as no ordinarily prudent person would incur, an employee is held

to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects." This charge is contradictory, and, we submit, does not clearly define the doctrine of assumption of risk. One of the premises of the charge is: "In the absence of such obvious dangers as no ordinarily prudent person would incur." This might be understood as meaning that, unless there were present such obvious dangers as no ordinarily prudent person would incur, the doctrine would not apply, or, in other words, if the coal tub with which plaintiff was working or the place in which he was working did not present dangers so obvious that ordinarily prudent persons would not incur them, then the doctrine did not apply. On the contrary, this clause may be contended to have the meaning that, if there were present such obvious dangers as no ordinarily prudent person would incur that then the doctrine would not apply; in other words, if the appliance or the place at which plaintiff was working did present dangers so obvious that no ordinarily prudent person would incur them, then the doctrine would not apply. *Spindin v. A. R. Co.*, 148 P. (Kan.) 747.

This definition is incorrect and does not comport with that of the United States Supreme Court, viz.:

> "On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman,—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."
>
> *Seaboard A. L. R. Co. v. Horton, supra.*

By this instruction the doctrine is limited to ordinary dangers. The language of the Supreme Court just quoted contains no such limitation, and, moreover, that Court has had occasion to specifically state that extraordinary risks are included in the doctrine.

> "Under the Federal Employers' Liability Act, except in the cases specified in Section 4, the employee assumes extraordinary risks incident to his employment and risks due to negligence of employer and fellow employees, when obvious or fully known and appreciated by him."
>
> *Bolt v. P. R. R. Co.* 245 U. S. 440, 445, 62 L. ed. 385.

(C) Defendant was not a guarantor of the safety of the place or work or of the machinery and appliances of the work.

By its said charge that "the negligence of any officer, agent or employee of the defendant, other than the negligence of plaintiff himself, is the negligence of the defendant, for which it would be liable" (Assignment No. 54, p. 24 herein; P. R. p. 423), and by its further charge that the plaintiff should have a verdict if "the defendant * * * or its officers, agents or employees in charge of said work furnished plaintiff with an iron tub to be used in the performance of his duties as such employee, which it knew to be defective or which its officers, agents, or employees, whose duty it was to superintend the plaintiff's work, knew to be defective, or which, by the exercise of reasonable diligence, the defendant or its officers, agents or employees superintending said work, might have known to be defective and liable to drop the handle of said iron bucket when so being used in said work, and that in consequence of said defect the

plaintiff, while exercising ordinary care, was injured while in the performance of his duty" (Assignment No. 56, p. 25 herein; P. R. p. 425), the Court substantially told the jury that defendant was a guarantor of the safety of the place of work, and of the machinery and appliances used in the work.

The charge did not limit defendant's duty to the exercise of reasonable care to furnish reasonably safe tools and appliances, but imposed upon defendant the duty to furnish reasonably safe tools, &c. As stated by the Circuit Court of Appeals of the Eighth Circuit,

> "Actionable negligence is nothing but a breach of the duty to exercise reasonable care. It is not a breach of a guaranty of the character of place or of appliances. If a duty to provide a reasonably safe place or reasonably safe appliances were imposed upon the master, he would become, in effect, a guarantor of their reasonable safety, because his failure in any respect to make and keep them reasonably safe would be a breach of that duty and would cast him in damages, however great were his watchfulness and diligence. This is not the legal measure of the master's duty or liability. The limit of his duty is to exercise ordinary care, having regard to the hazards of the service, to provide the servant with reasonably safe working places, machinery, tools, and appliances, and to exercise ordinary care to maintain them in a reasonably safe condition of repair. Citing cases."
>
> *Armour & Co. v. Russell*, 144 Fed. 614, 75 C. C. A. 416.

Clearly the First Employer's Liability Act did not cast the responsibility of being a guarantor upon the employer any more than did the Second Employer's Liability Act. That the latter Act did not do so, is well established by the United States Supreme Court.

> "The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. Citing cases. To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated. The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendant's negligence. In this there was error."

Seaboard A. L. R. Co. v. Horton, supra.

(D) Recovery barred by voluntary acceptance of danger or by acquiescence therein or by disregard of orders.

Defendant specifically requested instructions, all of which were refused, that the jury be charged that plaintiff could not recover if he knowingly selected a dangerous way of moving the coal tub (Assignment No. 35, p. 12 herein; P. R. pp. 394-395), and that he could not recover if he knowingly disregarded instructions as to the manner of moving said tub (Assignment No. 36, p. 13 herein; P. R. pp. 395-396); and that he could not recover if, with knowledge of the danger and with appreciation of the risk thereof, he continued to work without objection or without defendant's promising to remedy the defect, or, if such was made, for an unreasonable time thereafter without such defect being remedied (Assignment No. 39 p. 15 herein; P. R. p. 398); and if he learned of the dangers or they were such as he ought to have known in the course of his employment, that he assumed the risk thereof (Assignment No. 40, p. 16 herein; P. R. p. 399), and instructions relative to plaintiff's appreciation of the risks of his employment. (Assignments No's. 37 and 38, p. 14 herein; P. R. pp. 396-397).

These instructions, we submit, should properly have been given under the circumstances of the case. The evidence discloses that the appliance in

question was not a complicated piece of machinery, but was only a coal tub. There can be no question that an ordinarily prudent person would have appreciated the risk of having the bail fall upon his person, and that the bail would likely fall from an upright position when the tub was being moved across the floor of the hold. Such risks were too plainly observable for it to be seriously urged that a man with the knowledge and experience of plaintiff in handling plumber's tools, shovels, hooks, picks, etc., would not have appreciated the commonplace fact that the bail of any bucket is likely to be jarred loose when the bucket is moved in a horizontal plane. We submit that plaintiff was clearly charged with the assumption of the risk attributable to the bail of the bucket falling from its horizontal position, and that the instructions requested correctly stated the law and that defendant was entitled to have the jury so charged.

Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 98, 58 L. ed. 521, 524;

Seaboard A. L. R. Co. v. Horton, supra;

Jacobs v. Southern R. Co. 241 U. S. 229; 60 L. ed. 970, 976;

(E) Conflicting instructions that furnish no correct guide are erroneous.

Contention may be made, however, that the Court subsequently substantially granted these requests by its instructions Nos. 27 to 32, inclusive.

(P. R. pp. 432-434). Without conceding that the language of those instructions covers the language of the requested instructions, we submit that, even if such concession were made, the instructions so given do not cure the errors complained of in the instructions given by the Court, and that the conflictions and contradictions existing between those particular instructions and the instructions hereinabove specifically pointed out set up inconsistencies irreconcilable with each other, and are erroneous on that very ground. 38 CYC. 1604, 1605. And, even going further, and conceding for argument's sake that all or some of those subsequent instructions were correct, that does not shake our contention, for, as stated by Circuit Judge Sanborn, "The vice of a wrong rule in a charge of the court is not extracted by the fact that the right rule was also given therein, because it is impossible to tell by which rule the jury was governed." *Armour v. Russell*, 144 Fed. 614, 75 C. C. A. 416.

X.

CONTRIBUTORY NEGLIGENCE IS A BAR TO A RECOVERY UNDER THE FIRST EMPLOYER'S LIABILITY ACT, EXCEPT WHERE THE EMPLOYEE'S NEGLIGENCE IS SLIGHT AND THE EMPLOYER'S NEGLIGENCE IS GROSS IN COMPARISON THERETO.

Section 2 of the First Employer's Liability Act provides:

to the plaintiff in proportion to the amount of the negligence attributable to the plaintiff in comparison with the combined negligence of the plaintiff and the defendant, and to return a verdict accordingly." (Assignment No. 51, p. 22 herein; P. R. p. 421).

The standard set up by the statute, i. e.: slight negligence of plaintiff and gross negligence of defendant, was thus eliminated and the jury virtually instructed that contributory negligence was not a bar if the plaintiff's negligence was slight, regardless of whether or not defendant's negligence was slight, ordinary or gross. A new standard was set up, i.e.: a comparison between plaintiff's negligence and the combined negligence of plaintiff and defendant.

The further charge was made that "no person shall recover damages from a common carrier under the laws in force in Alaska for a personal injury to himself, where the injury was done by his own consent, or was caused by his own negligence, without any negligence on the part of the defendant" (Assignment No. 52, p. 23 herein; P. R. p. 421). By this instruction the jury was told, in effect, that, if any negligence whatsoever existed on defendant's part, then it was immaterial to what extent the injury was due to plaintiff's own consent or negligence. An explanation was added: "but where the plaintiff and defendant are both at fault the plaintiff may still recover, provided,

he could not, by the exercise of ordinary care, have prevented the injury, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such plaintiff employee." (Assignment No. 52, p. 23 herein; P. R. pp. 421-422). The charge as a whole thus entirely ignored the hypothesis that the plaintiff's contributory negligence was a bar to a recovery: (a) if the negligence of both plaintiff and defendant was equal, or (b) if the plaintiff's contributory negligence was gross and that of the defendant slight in comparison thereto.

The proviso "provided he could not, by the exercise of ordinary care, have prevented the injury" does not cure the error, inasmuch as, under the standard fixed by the statute, plaintiff's negligence must be slight and defendant's negligence gross in comparison thereto in order that contributory negligence shall not constitute a bar. Plaintiff thus had the duty to exercise more than ordinary care to prevent the injury.

The further charge was made that "if you shall find that the plaintiff was guilty of contributory negligence, the Act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So * * * the negligence of the plaintiff is not a bar to a re-

covery, but it goes by way of diminution of damages in proportion to his negligence as compared with the combined negligence of himself and the defendant." (Assignment No. 53, p. 23 herein; P. R. p. 422). The statutory standard of comparative negligence was thus again completely laid to one side, and contributory negligence, regardless of degree, declared not to be a bar to a recovery.

The next charge that "Therefore, as a matter of law, the negligence of any officer, agent, or employee of the defendant, other than the negligence of the plaintiff himself, is the negligence of the defendant, and for which it would be liable" (Assignment No. 54, p. 24 herein; P. R. p. 423) went even further and, in effect, made defendant liable for its negligence under all circumstances.

A perusal of these instructions discloses, we submit, contradictions which cannot be reconciled and from which the jury could obtain no correct guide as to the application to be made by it of the doctrine of contributory negligence. These conflictions and contradictions constituted error. 38 CYC 1604, 1605; *Deserant v. R. Co.*, 178 U. S. 409, 44 L. ed. 1127. Moreover, the trend of the instructions is away from the statute until the culmination is reached in an absolute departure from the statutory standard of comparative negligence applicable to the case. The impression was thus finally left with the jury that the statute had

entirely abolished the doctrine of contributory negligence and that that defense under no circumstances was a bar to a recovery. The vice of such impressions could not have been cured by the instructions based upon the statute because no one can tell by which rule the jury was controlled. *Armour Co. v. Russell*, 144 Fed. 615, 75 C.C.A. 416.

XI.

UNDER THE FIRST EMPLOYER'S LIABILITY ACT THERE IS NO LIABILITY WITHOUT NEGLIGENCE.

Section I of the Act of June 11, 1906, specifically limits the carrier's liability to its employees: "for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect, or insufficiency due to its negligence in its cars, etc." Ch. 3073, 34 Stat. L. 232.

This language is closely akin to that used in Section I of the Second Employer's Liability Act of April 22, 1908, which provides that the employer shall be liable to the employee:

> "For such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such common carrier, or by reason of any defect or insufficiency due to its negligence in its cars, etc."
>
> Ch. 149, 35 Stat. L. 65.

Under the latter Act the Supreme Court has held that the "plain effect of these words is to condition the liability upon negligence." *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. ed. 1062, 1069.

No one will controvert the assertion that the effect of the practically similar words of the First Employer's Liability Act (above quoted) conditions the liability of that statute upon negligence.

To meet this construction defendant offered two instructions (Assignments Nos. 43 and 44, pp. 23-24, herein; P. R. pp. 400-403), both of which were refused by the Court. Inasmuch as the liability under the statute is conditioned upon negligence, then the mere happening of the accident necessarily was not an evidence of negligence, and the mere existence of a defect in the coal tub would not entitle plaintiff to recover; otherwise, there might be liability without negligence. The ordinary application of the common law rule in this respect is left more clearly open under the Act of June 11, 1906, than it is under the Act of April 22, 1908, as the latter Act has express restrictions and limitations which are absent from the previous Act. That it is left open under the latter Act is announced in *Seaboard A. L. R. Co. v. Horton, supra.*

The defendant requested an instruction, which was refused, that the defendant could not be guilty

of negligence unless it had knowledge of the defect, or in the exercise of ordinary care could have acquired such knowledge (Assignment No. 47, p. 26 herein; P. R. p. 404). This instruction is logically founded upon the principle that the defendant is neither a guarantor nor is it liable unless negligent; and, inasmuch as the fact of the defect itself does not constitute negligence, it is very apparent that in order to have been negligent the defendant must either have had knowledge thereof or have been able to acquire such knowledge in the exercise of ordinary care. *Reese v. Phil. & R. R. Co.* 239 U. S. 384, 60 L. ed. 384, 387; *Seaboard A. L. R. Co. v. Horton, supra.*

XII.

THE COURT SHOULD HAVE DIRECTED A VERDICT FOR THE DEFENDANT.

At the close of the evidence the defendant moved for a directed verdict (Assignment No. 30, p. 12 herein; P. R. p. 393). In its denial of the motion the learned trial Court apparently overlooked that from the plaintiff's own evidence there were present the elements, uncontradicted, which made the question one of law for the decision of the Court and not one of fact for the decision of the jury.

Plaintiff's witness Young testified that the first bucket after going to work in the afternoon dumped its load of coal, as the result of striking the

hopper on which he was standing, causing the latch to become unfastened (P. R. pp. 72-74); that he thought the bucket dumped twice, and that then it was laid aside, but that it was put to work again sometime before six o'clock (P. R. pp. 69-71); that he called for and obtained lanyards to use on the buckets, but he used them only on two tubs because the third had nothing to which to tie the lanyard (P. R. p. 78); he said "I shouted about it as much as anybody" (P. R. p. 69), and that he complained about it, but does not state to whom. He plainly indicates that the danger from the bucket which he had in mind was of the coal spilling out on the workmen, which danger diminished as the work progressed (P. R. p. 71). His opinion that the appliance was unsafe does not disclose wherein it was unsafe. On cross examination, his recollection was that the three tubs were working during the evening, from supper time on (P. R. p. 117); that the three buckets were put in use as soon as the hold was opened up sufficiently to permit it (P. R. p. 117), and clearly intimated that there was ample light for the men to work in (P. R. p. 132). The witness left work at twelve o'clock midnight (P. R. p. 76), and was not present at the time of the accident (P. R. p. 99). Young plainly had no personal knowledge as to the bail of which tub struck plaintiff.

Plaintiff's witness Williams, who went to work at one o'clock in ths morning with McHugh and was

present when plaintiff was hurt, at which time he was pushing on one side of the bucket, while plaintiff was pulling the bucket on the back end, said that the bail of the bucket fell because "it was kind of a rough place where we handled this bucket, and the jarring of it I guess loosened the bail of the bucket and it fell on his foot" (P. R. p. 133-135); that more than four bucket loads were taken out between one o'clock and the time of plaintiff's accident; that he used the same bucket all of the time (P. R. p. 145), apparently meaning while he was working with plaintiff.

Plaintiff's witness Gillis, who worked with Williams, went to work about 1:30 o'clock in the morning (P. R. p. 147). He worked with the bucket about two hours (P. R. p. 149). On cross examination he testified that the bail could not fall except toward the rear (P. R. p. 154). His testimony fails to disclose whether or not he had any personal knowledge as to the bail of which tub struck plaintiff, or as to whether or not he actually worked with plaintiff.

Plaintiff's witness Soderberg, who saw the accident(P. R. p. 160), which happened about half an hour after he went to work (P. R. p. 160), could see that the bucket was no good and he told his fellow workman: "You better get away from that; it doesn't look good to me" (P. R. p. 161); that there was nothing about the tub that could not be easily seen; no concealed mechan-

ism about it; all of it was plainly visible, all of the mechanics of the tub, except possibly the rear wheel. (P. R. p. 173).

Plaintiff's witness Klemm did not see the accident, but he saw plaintiff being helped out of the hold after the accident (P. R. p. 176). He stated that there was plenty of light in the hold (P. R. p. 182). The defect of the tub which he had in mind was so apparent that he could have found it out if he had no light at all, and by the sense of feeling (P. R. p. 187); that the first or second bucket dumped after the work was resumed at one o'clock (P. R. p. 214), and that he had some conversation with the mate about it, but the bucket was continued to be used until the cargo of coal was dicharged (P. R. p. 215).

Young (P. R. pp. 108-109), Williams(P. R. pp. 142-143), Gillis (P. R. pp. 154-155), and Soderberg (P. R. pp. 168-169), all testified, in effect, that the bail was let down at the time that the buckets were being loaded with coal in the hold. Young testified that the bail could not fall toward the front of the tub (P. R. p. 83), in which he was corroborated by Williams (P. R. p. 142) and by Gillis (P. R. p. 154), and Soderberg stated that the tub was ordinarily pulled out of the hold backwards, with the bail down (P. R. p. 168-169).

Young stated that the capacity of each tub was about 1700, 1800, or 1900 pounds (P. R. p. 92), and that each tub had a capacity of about six tons per hour (P. R. p. 101), in which he was cor-

roborated by Gillis (P. R. p. 156). Williams said that he had taken out more than four tub loads when the plaintiff was injured; hence, the presumption can safely be made that it was nearly two o'clock before plaintiff was injured.

Plaintiff testified in detail as to the kinds of work in which he had engaged that he was a plumber by trade; that he had worked in a mine as handyman and made different things and timbered a 190 foot shaft; and installed an air ventilation system for the compressor room; that he worked on the Government trail, mostly doing axe work in the building of bridges and culverts; that he had worked on a mining claim; that he had done railroad station work, consisting mostly of pick, shovel and wheelbarrow work; that he had done longshoring in Cordova; that he had worked in a logging-camp, bucking and splitting wood and firing the donkey engine; that he had worked as a carpenter helper; that he had shovelled rock; that he had done road work; that he had done the plumbing for a mine manager's residence and mine bunkhouse; that he had done pipe-fitting in a mine; that he had worked in the Eska coal mine; that he had done work about a mine; that he had worked as a plumber in Seattle, Vancouver and Victoria—work of a master plumber —and was in the plumbing business in Seattle and Vancouver (P. R. pps. 189-204); that he worked from 7 o'clock until twelve o'clock midnight, and resumed work at one o'clock (P. R. 205-209); and that he had seen coal buckets before, but had

never worked with one. On cross examination he went further into detail as to the work he had done (P. R. p. 252). He stated that he had no difficulty in catching on to the work (P. R. p. 265). While claiming that he saw nothing attached to it except the bail, he admitted that he could plainly see the rear wheels of the bucket (P. R. p. 274).

Can plaintiff seriously contend that five hours continuous work with the bucket was insufficient time to make the actual condition and dangers, if any, of the bucket known to and appreciated by him? The bucket's condition had been constant during all of the time that McHugh was at work. No knowledge other than common knowledge was required to appreciate the danger of being struck by a heavy iron bail; and a bail that in fact undoubtedly had been let down every time the bucket was loaded. The bucket had been loaded with coal practically every ten to fifteen minutes during the five hours; he was a man of full age and intelligence and with adequate experience, and, moreover, according to his own witnesses, there was nothing concealed about the bucket.

These facts, we submit, plainly bring this case within the rule announced by the Supreme Court of the United States that:

> "Where the conditions are constant and of long standing and the danger one that is suggested by the common knowledge which all possess, and both the conditions and the dan-

gers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for decision of the Court. Upon such a state of evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly."

Butler v. Frazee, 211 U. S. 459, 53 L. ed. 281, 285;

Reese v. P. & R. R. Co., 239 U. S. 463, 60 L. ed. 385;

Ry Co. v. Wiles, 240 U. S. 444; 60 L. ed. 732;

Southern R. R. Co. v. Gray, 241 U. S. 333, 60 L. ed. 1030.

CONCLUSION.

The law and the facts thus plainly revealing that, by the proceedings had herein, the defendant has been materially prejudiced to its injury, we earnestly urge that defendant is entitled to a reversal of the judgment given in the lower court. Briefly summarizing the law and the facts, we find that prejudicial errors were committed in the following respects, viz.:

1. Evidence erroneously received over defendant's objections (Points 1, 2, 3, and 4).

2. Defendant erroneously denied the exercise of its right of cross-examination (Point 5).

3. Defendant erroneously denied the exercise of its right of rebutting plaintiff's evidence (Point 6).

4. Instructions, raising issues not supported by evidence, erroneously charged over defendant's objections, and instructions, properly eliminating those issues, erroneously refused (Point 7).

5. Instructions, improperly assuming the existence and applicability of the Act of June 11, 1906, erroneously charged over defendant's objections, and instructions, properly ignoring the existence and applicability of said act, erroneously refused (Point 8).

6. Instructions, misconstruing effect of provisions of the Act of June 11, 1906, erroneously charged over defendant's objections, and instructions, properly construing that Act if it be in effect and applicable, erroneously refused (Points 9, 10 and 11).

7. Erroneous denial of a directed verdict for defendant (Point 12).

Respectfully submitted,

R. E. ROBERTSON,
A. H. ZIEGLER,
BOGLE, MERRITT & BOGLE,

Attorneys for the Alaska Steamship Company, Plaintiff in Error (Defendant below).